

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Appellant(s): Laborbe et al.
Appl. No.: 10/501,975
Conf. No.: 3409
Filed: July 15, 2004
Title: PREPARATION OF PRODUCTS HAVING ROASTED APPEARANCE
Art Unit: 1794
Examiner: Viren A. Thakur
Docket No.: 3714652-491

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPELLANTS' APPEAL BRIEF

Sir:

Appellants submit this Appeal Brief in support of the Notice of Appeal filed on July 16, 2010. This Appeal is taken from the Final Rejection in the Office Action dated April 16, 2010.

I. REAL PARTIES IN INTEREST

The real party in interest for the above-identified patent application on Appeal is Nestec S.A., by virtue of an Assignment recorded on September 28, 2004 at reel 015193, frames 0390-0392, in the United States Patent and Trademark Office.

II. RELATED APPEALS AND INTERFERENCES

Appellants' legal representative and the Assignees of this patent application do not know of any prior or pending appeals, interferences or judicial proceedings that may be related to, directly affect or be directly affected by or have a bearing on the Board's decision with respect to the above-identified Appeal.

III. STATUS OF CLAIMS

Claims 10-11, 14, 16, 22-24 and 38-46 are pending in this application. Claims 25-37 are withdrawn. Claims 1-9, 12-13, 15, 17-21 were previously canceled. Claims 10-11, 14, 16, 22-24 and 38-46 stand rejected. Therefore, Claims 10-11, 14, 16, 22-24 and 38-46 are being appealed in this Brief. A copy of the appealed claims is included in the Claims Appendix.

IV. STATUS OF AMENDMENTS

A Non-Final Office Action was mailed on December 14, 2009. Appellants responded to the Non-Final Office Action on February 9, 2010 arguing against the 35 U.S.C. §112 rejections and the obviousness rejections by amending the claims. A Final Office Action was mailed on April 16, 2010 withdrawing the 35 U.S.C. §112 rejections and maintaining the rejections of the claims as obvious. Appellants filed a Notice of Appeal on July 16, 2010 in response to the Final Office Action.

V. SUMMARY OF CLAIMED SUBJECT MATTER

A summary of the claimed subject matter by way of reference to the specification and/or figures for each of the independent claims is provided as follows:

Independent Claim 10 recites an animal food composition comprising an animal food piece comprising from 55% to 85% by weight of at least one of a meat and a fish, from 10% to 25% by weight of a cereal, and from 6% to 15% by weight of water (page 6, line 26 to page 7, line 14); and a coating on the pet food piece and having a roasted appearance after cooking (page 2, lines 30-38), wherein the coating comprises sodium alginate in an amount from about 1% to about 2% (page 4, lines 27-31; page 9, line 23), from 5% to 10% by weight of at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof (page 2, lines 33-35; page 4, lines 7-11 and 20-25); and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof (page 2, lines 33-35; page 3, lines 1-9; page 4, lines 7-11 and 33-37; page 5, lines 6-11).

Independent Claim 38 recites an animal food composition comprising an animal food piece comprising from 58% to 68% by weight of at least one of a meat and a fish, from 10% to 25% by weight a cereal, from 2% to 5% of a plant protein, and from 5% to 14% by weight of water (page 6, line 26 to page 7, line 14); and a coating on the pet food piece and having a roasted appearance after cooking (page 2, lines 30-38), wherein the coating comprises sodium alginate in an amount from about 1% to about 2% (page 4, lines 27-31; page 9, line 23), at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof (page 2, lines 33-35; page 4, lines 7-11 and 20-25); and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof (page 2, lines 33-35; page 3, lines 1-9; page 4, lines 7-11 and 33-37; page 5, lines 6-11).

Independent Claim 46 recites an animal food composition comprising a meat emulsion (page 3, lines 11-15) comprising a mixture of a meat, a cereal, a textured protein, water, vitamins, salt, a flavoring and a colorant (page 6, line 26 to page 7, line 14); and a coating on the meat emulsion and having a roasted appearance after cooking (page 2, lines 30-38), wherein the coating comprises sodium alginate in an amount from about 1% to about 2% (page 4, lines 27-31; page 9, line 23), at least one of a source of pigments or colorants selected from the group

consisting of a powdered blood, a frozen blood and combinations thereof (page 2, lines 33-35; page 4, lines 7-11 and 20-25); and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof (page 2, lines 33-35; page 3, lines 1-9; page 4, lines 7-11 and 33-37; page 5, lines 6-11).

Although specification citations are given in accordance with 37 C.F.R. §1.192(c), these reference numerals and citations are merely examples of support in the specification for the terms used in this section of the Brief. There is no intention to suggest in any way that the terms of the claims are limited to the examples in the specification. As demonstrated by the references numerals and citations, the claims are fully supported by the specification as required by law. However, it is improper under the law to read limitations from the specification into the claims. Pointing out specification support for the claim terminology in accordance with Rule 1.192(c) does not in any way limit the scope of the claims to those examples from which they find support. Nor does this exercise provide a mechanism for circumventing the law precluding reading limitations into the claims from the specification. In short, the reference numerals and specification citations are not to be construed as claim limitations or in any way used to limit the scope of the claims.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

1. Claims 10-11, 14, 16, 23-24, 38-42 and 44-46 are rejected under 35 U.S.C. §103(a) as being unpatentable over International Patent Publication No. WO 00/65937 to Prasad et al. ("*Prasad*") in view of U.S. Patent No. 5,567,466 to Dupont-Delhovren ("*Dupont*") and further view of U.S. Patent No. 3,898,345 to Horrocks et al. ("*Horrocks*"), GB 2 315 399 to Ariss et al. ("*Ariss*"), U.S. Patent No. 3,808,340 to Palmer ("*Palmer*"), U.S. Patent No. 5,059,444 to Ito et al. ("*Ito*") and U.S. Patent No. 3,073,700 to Ziegler ("*Ziegler*") and further in view of U.S. Patent No. 3,586,512 to Hagen et al. ("*Hagen*"), JP 58-190364 to Mizutani et al. ("*Mizutani*") and the printed publication to Igoe ("*Igoe*")
2. Claims 22 and 43 are rejected under 35 U.S.C. §103(a) as being unpatentable over the references as applied to Claims 10-11, 14, 16, 23, 24, 38-42 and 44-46 above, and in further view of U.S. Patent No. 4,089,983 to Hood ("*Hood*"), U.S. Patent No. 4,508,741 to Corbett et al. ("*Corbett*"), Encyclopedia of Food Science and Technology to Francis ("*Francis*"), U.S. Patent No. 3,434,843 to Durst ("*Durst*"), Dictionary of Food Ingredients to Igoe ("*Igoe*"), U.S. Patent No. 2,567,085 to Stoloff ("*Stoloff*") U.S. Patent No. 3,965,259 to Coppage et al. ("*Coppage*") and U.S. Patent No. 3,873,736 to Palmer ("*Palmer II*").
3. Claims 10, 14, 16, 23-24, 38, 40-42 and 44-46 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Horrocks* in view of *Ito*, *Dupont* and *Ziegler* and in further view of *Hagen* and *Mizutani*.
4. Claims 22 and 43 are rejected under 35 U.S.C. §103(a) as being unpatentable over the references as applied to Claims 10, 12, 14, 16, 23, 24, 38, 40-42, and 44-46 above, and in further view of *Prasad*, *Hood*, *Corbett*, *Francis*, *Durst*, *Igoe*, *Stoloff*, *Coppage* and *Palmer II*.

VII. ARGUMENT

A. LEGAL STANDARDS

Obviousness under 35 U.S.C. §103

The Federal Circuit has held that the legal basis for a determination of obviousness under 35 U.S.C. § 103 is:

whether the claimed invention as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made...The foundational facts for the *prima facie* case of obviousness are: (1) the scope and content of the prior art; (2) the difference between the prior art and the claimed invention; and (3) the level of ordinary skill in the art...Moreover, objective indicia such as commercial success and long felt need are relevant to the determination of obviousness...Thus, each obviousness determination rests on its own facts.

In re Mayne, 41 U.S.P.Q. 2d 1451, 1453 (Fed. Cir. 1997).

In making this determination, the Examiner has the initial burden of proving a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q. 2d 1955, 1956 (Fed. Cir. 1993). This burden may only be overcome “by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings.” *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). “If the examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the applicant is entitled to grant of the patent.” *In re Oetiker*, 24 U.S.P.Q. 2d 1443, 1444 (Fed. Cir. 1992).

Moreover, the Examiner must provide explicit reasons why the claimed invention is obvious in view of the prior art. The Supreme Court has emphasized that when formulating a rejection under 35 U.S.C. § 103(a) based upon a combination of prior art elements it remains necessary to identify the reason why a person of ordinary skill in the art would have combined the prior art elements in the manner claimed. *KSR v. Teleflex*, 127 S. Ct. 1727 (2007).

Of course, references must be considered as a whole and those portions teaching against or away from the claimed invention must be considered. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve Inc.*, 796 F.2d 443 (Fed. Cir. 1986). “A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged

from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the Applicant.” *Monarch Knitting Mach. Corp. v. Fukuhara Indus. Trading Co., Ltd.*, 139 F.3d 1009 (Fed. Cir. 1998) (quoting *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994)).

B. THE CLAIMED INVENTION

There are three independent claims on appeal: Claims 10, 38 and 46. Independent Claim 10 is directed to an animal food composition comprising an animal food piece. The animal food piece comprises from 55% to 85% by weight of at least one of a meat and a fish, from 10% to 25% by weight of a cereal, and from 6% to 15% by weight of water. The animal food composition further comprises a coating on the pet food piece. The coating has a roasted appearance after cooking. The coating comprises sodium alginate in an amount from about 1% to about 2% and from 5% to 10% by weight of at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof. The coating also comprises a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof.

Independent Claim 38 is directed to an animal food composition comprising an animal food piece. The animal food piece comprises from 58% to 68% by weight of at least one of a meat and a fish, from 10% to 25% by weight a cereal, from 2% to 5% of a plant protein, and from 5% to 14% by weight of water. The animal food composition also comprises a coating on the pet food piece. The coating has a roasted appearance after cooking. The coating comprises sodium alginate in an amount from about 1% to about 2% and at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof. The coating further comprises a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof.

Independent Claim 46 is directed to an animal food composition comprising a meat emulsion. The meat emulsion comprises a mixture of a meat, a cereal, a textured protein, water, vitamins, salt, a flavoring and a colorant. The animal food composition further comprises a coating on the meat emulsion. The coating has a roasted appearance after cooking. The coating comprises sodium alginate in an amount from about 1% to about 2% and at least one of a source

of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof. The coating further comprises a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof.

C. THE REJECTION OF CLAIMS 10-11, 14, 16, 23-24, 38-42 AND 44-46 UNDER 35 U.S.C. §103(A) IN VIEW OF PRASAD, DUPONT, HORROCKS, ARISS, PALMER, ITO, ZIEGLER, HAGEN, MIZUTANI AND IGOE SHOULD BE REVERSED BECAUSE THE EXAMINER HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF OBVIOUSNESS

1. Prasad, Dupont, Horrocks, Ariss, Palmer, Ito, Ziegler, Hagen, Mizutani and Igoe alone or in combination fail to disclose or suggest each and every element of independent Claims 10, 38 and 46

Independent Claims 10 and 38 recite, in part, an animal food piece including from 55% to 85% by weight of at least one of a meat and a fish, from 10% to 25% by weight of a cereal, and from 6% to 15% by weight of water, and a coating on the pet food piece and having a roasted appearance after cooking. The animal food piece coating comprises a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof, and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof. The animal food piece coating further comprises sodium alginate in an amount from about 1% to about 2%.

Independent Claim 46 recites, in part, a meat emulsion comprising a mixture of a meat, a cereal, a textured protein, water, vitamins, salt, a flavoring and a colorant. There is a coating on the meat emulsion that provides a roasted appearance after cooking. The coating comprises sodium alginate in an amount from about 1% to about 2%, a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof, and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof

Appellants have surprisingly found that preparing an animal food piece or a meat emulsion with a coating including a source of pigments or colorants such as a powdered blood or

a frozen blood along with a sodium alginate and a source of protein provides the coating with a roasted appearance after cooking. If the cooking temperature is sufficiently high, the proteins coagulate and fix the pigment, thereby creating a surface that is browned in a scattered manner and thus appears roasted rather than merely colored. See specification, page 1, paragraph 7; paragraph 8, lines 5-12. The claimed coating mixture advantageously allows for a percentage of the roasted surface to be modulated by simple modification of the amount of proteins and/or of colorants contained in the coating, or simply by varying the cooking times and temperatures.

The cited references fail to disclose or suggest each and every element of the present claims. *Prasad, Dupont, Horrocks, Ariss, Palmer, Ito, Ziegler, Hagen, Mizutani* and *Igoe* alone or in combination fail to disclose or suggest a coating having a roasted appearance after cooking on an animal food piece including from 55% to 85% by weight of at least one of a meat and a fish, from 10% to 25% by weight of a cereal, and from 6% to 15% by weight of water as required, in part, by independent Claims 10 and 38. *Prasad, Dupont, Horrocks, Ariss, Palmer, Ito, Ziegler, Hagen, Mizutani* and *Igoe* alone or in combination fail to disclose or suggest a coating having a roasted appearance after cooking on a meat emulsion comprising a mixture of a meat, a cereal, a textured protein, water, vitamins, salt, a flavoring and a colorant as required by independent Claim 46. Finally, *Prasad, Dupont, Horrocks, Ariss, Palmer, Ito, Ziegler, Hagen, Mizutani* and *Igoe* alone or in combination fail to disclose or suggest an animal food piece or emulsion coating comprising the specifically recited mixture of sodium alginate in an amount from about 1% to about 2%, at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof, and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof as required by independent Claims 10, 38 and 46.

Prasad discloses a multi-functional marinade for fish and meat products that adds flavor to the fish or meat product. See *Prasad*, page 3, lines 13-24. *Prasad* fails to disclose or suggest that its fish or meat products including a marinade are animal food compositions. In fact, *Prasad* fails to disclose the specific ranges and components of the claimed animal food piece having a combination of a meat, a cereal and water specifically formulated for an animal food product. As such, *Prasad* fails to disclose or suggest an animal food piece including a coating having a roasted appearance after cooking or the use of sodium alginate or a powdered blood/frozen blood in the coating.

Dupont discloses animal food compositions prepared from a mixture of from 55% to 85% meat and meat by-product and from 10% to 25% cereal ingredients by weight. See *Dupont*, Abstract and column 2, lines 42-52. *Dupont* fails to teach or suggest any coatings for his animal food compositions or a need or use for the animal food composition to have a roasted appearance. Instead, *Dupont* discloses that the animal food compositions are stored with a sauce or a base in a container, which is distinguishable from a coating in accordance with the present claims

Horrocks discloses a meat-like protein food having the appearance and chewing properties of natural muscle meat. See *Horrocks*, column 1, lines 40-62. The meat-like protein food is made by impregnating bundles of artificial protein fibers with an emulsion containing a heat coagulable binding agent such as gluten, albumen or starch, forming at least at the surface of the impregnated bundles, for example by coagulation, a protective layer resistant to cooking conditions, and compacting together a number of the bundles in an oriented arrangement, coagulating the binding agent and bonding the bundles together. *Horrocks* fails to teach or suggest any sodium alginate in the coatings for his meat-like protein food or a need or use for the meat-like protein food to have a roasted appearance.

Ariss discloses a gelled food product that mimics the appearance of a naturally occurring foodstuff. See *Ariss*, page 1, lines 1-15. *Ariss* fails to teach or suggest any sodium alginate in the coatings for his gelled food product or a need or use for the gelled food product to have a roasted appearance.

Palmer discloses a food product comprising a core encased within a cover layer of substantial thickness. See *Palmer*, column 1, lines 10-20. *Palmer* fails to teach or suggest any sodium alginate in the coatings for his food product or a need or use for the food product to have a roasted appearance due to pigment/colorants and proteins. Although *Palmer* teaches using blood in its coating material, nowhere does *Palmer* disclose or suggest that the blood is used either as a coloring agent or in the claimed range.

Ito discloses a method of producing roast meat products by adding a red color pigment to and dispersing throughout a block of raw meat. See *Ito*, column 2, lines 17-32. The pigment has a discoloration temperature higher than the sterilization temperature of the meat product for a given heating time and the pigment losing its red color upon heating to the discoloration

temperature or higher. *Ito* fails to teach or suggest any coatings for his meat products or a need or use for the meat products to have a coating.

Ziegler discloses a blood pigment preparation for meat products. See *Ziegler*, column 1, lines 10-40. *Ziegler* fails to disclose an animal food piece including a coating having a roasted appearance after cooking or a need or use for the meat products to have a roasted appearance. Furthermore, *Ziegler* merely teaches incorporating whole blood in the meat itself to impart a desirable red color to the finished meat product, rather than using the blood as a colorant for coating the meat. *Id.* As such, *Ziegler* fails to disclose or suggest a coating having a roasted appearance after cooking wherein the coating comprises a specified range of powdered blood and/or a frozen blood in accordance with the present claims.

Hagen discloses a composition of water-soluble food dye, edible fat and farinaceous material for coating good products prior to baking. See *Hagen*, column 3, lines 60-67. *Hagen* fails to teach or suggest a need or use for the goods to have a roasted appearance due to blood and proteins in the coating.

Mizutani discloses a raw food material that is covered with a material containing grain flour using a batter as a binder and baked. See *Mizutani*, Abstract. Although *Mizutani* discloses that the batter can include sodium alginate, *Mizutani* discloses that the raw material is coated with the batter and further covered with bread crumbs or wheat flour and baked. *Mizutani* fails to teach or suggest any coatings for the raw food material for generating a roasted appearance due to pigment/colorants and proteins in the coating.

Igoe merely lists the definition of sodium alginate and its use as a binder, thickener or gelling agent. *Igoe* fails to teach or suggest that the sodium alginate can be used in coatings for generating a roasted appearance due to pigment/colorants and proteins in the coating.

In sum, none of the cited references discloses using sodium alginate and a source of proteins along with powdered blood or frozen blood as a colorant at the claimed range that provides a roasted appearance coating on an animal food piece or animal meat emulsion in accordance with the present claims. For at least the reasons identified above, the cited references fail to disclose or suggest each and every element of independent Claims 10, 38 and 46. Accordingly, Appellants respectfully submit that Claims 10, 38 and 46, along with any claims that depend from Claims 10, 38 and 46, are novel, nonobvious and distinguishable from the cited references and are in condition for allowance.

2. The skilled artisan would have no reason to arrive at the claimed invention in view of the cited references

Appellants respectfully submit that the skilled artisan would have no reason arrive at the claimed invention using the cited references in the absence of hindsight because the cited references are entirely directed to different food products utilizing varying ingredients for different intended purposes. Moreover, Appellants respectfully submit that the Examiner is using Appellants' patent application as a road map for creating hindsight obviousness and has failed to set forth sufficient reasons for how the skilled artisan would arrive at the claimed invention in view of the cited references. For instance, the cited references fail to disclose or suggest to the skilled artisan any single animal food coating formulation comprising sodium alginate, powdered/frozen blood and a protein in accordance with independent Claims 10, 38 and 46.

Prasad discloses a multi-functional marinade for fish and meat products that adds flavor to the fish or meat product. See *Prasad*, page 3, lines 13-24. The marinade is added to fish and meat products that are fresh, frozen or thawed. See *Prasad*, page 14, lines 16-20. *Prasad* fails to disclose or suggest that its fish or meat products including a marinade are animal food compositions. There is no indication that the fish and meat products are processed or suitable for animals. Moreover, at no place in the disclosure does *Prasad* even mention that colorants may be anything other than "caramel color, annatto natural color, tumeric, paprika, tea leaves, and the like." See *Prasad*, page 6, lines 17-19.

Dupont discloses processed animal food compositions prepared from a mixture of from 55% to 85% meat and meat by-product and from 10% to 25% cereal ingredients by weight. See *Dupont*, Abstract and column 2, lines 42-52. As processed animal food compositions¹ are distinguishable from unprocessed fish and meat products, the skilled artisan would have no

¹ *Dupont* teaches the use of meat and meat by-products specifically chosen for animal consumption such as products and by-products arising from the processing of the bodies or body parts of warm-blooded animals. Meat is understood to mean in particular the meat from chickens, rabbits, bovines or ovines and offal. Offal is understood to mean lung lobes as well as livers or kidneys. Meat by-products is understood to mean the meal obtained from carcasses of the abovementioned animals. See *Dupont*, column 1, lines 51-63 and Examples 1-3.

reason to substitute the processed animal food compositions of *Dupont* for the fresh, frozen or thawed fish/meat products of *Prasad* in the absence of hindsight. *Dupont* further fails to teach the need coatings for his animal food compositions or a need or use for the animal food composition to have a roasted appearance. Instead, *Dupont* discloses that the animal food compositions are stored with a sauce or a base in a container, which is distinguishable from a coating in accordance with the present claims.

Horrocks discloses a processed meat-like protein food having the appearance and chewing properties of natural muscle meat. See *Horrocks*, column 1, lines 40-62. The meat-like protein food is made by impregnating bundles of artificial protein fibers with an emulsion containing a heat coagulable binding agent such as gluten, albumen or starch, forming at least at the surface of the impregnated bundles, for example by coagulation, a protective layer resistant to cooking conditions, and compacting together a number of the bundles in an oriented arrangement, coagulating the binding agent and bonding the bundles together. As processed meat-like protein food is distinguishable from unprocessed fish and meat products, the skilled artisan would have no reason to substitute the processed meat-like protein food of *Horrocks* for the fresh, frozen or thawed fish/meat products of *Prasad* in the absence of hindsight.

Ariss discloses a gelled food product that mimics the appearance of a naturally occurring foodstuff. See *Ariss*, page 1, lines 1-15. As the gelled food product of *Ariss* is specifically made to mimic naturally occurring foods such as meat or fish, *Ariss* teaches away for the gelled food product to have a roasted appearance.

Palmer discloses a food product comprising a core encased within a cover layer of substantial thickness. See *Palmer*, column 1, lines 10-20. *Palmer* fails to teach or suggest any sodium alginate in the coatings for his food product or a need or use for the food product to have a roasted appearance due to pigment/colorants and proteins. Although *Palmer* teaches using blood in its coating material, nowhere does *Palmer* disclose or suggest that the blood is used either as a coloring agent or in the claimed range. See *Palmer*, column 7, lines 15-45. The portion of *Palmer* relied on by the Patent Office merely teaches that the coating may include coloring agents and, in a separate section, that the coating can include 1.6% by weight of beef blood, which is significantly below the level of 5% to 10% by weight required by Claim 10. See *Palmer*, column 3, lines 38-42; column 7, line 35. As a result, *Palmer* fails to teach or suggest

that the beef blood is used a coloring agent or provides a roasting appearance in accordance with the present claims.

Ito discloses a method of producing roast meat products by adding a red color pigment to and dispersing throughout a block of raw meat. See *Ito*, column 2, lines 17-32. The pigment has a discoloration temperature higher than the sterilization temperature of the meat product for a given heating time and the pigment losing its red color upon heating to the discoloration temperature or higher. The objective of using the red color pigment is to maintain the original color of the center of the cooked meat. See *Ito*, column 2, lines 28-32. *Ito* fails to teach or suggest any coatings for his meat products because the red color pigment is added throughout the meat, which would lead the skilled artisan away from the present claims.

Moreover, contrary to the Examiner's assertion, *Ito* does not disclose that the blood pigment causes the roasted appearance. See Non-Final Office Action, page 8, lines 17-19. Rather, *Ito* discloses that the blood pigment win the roast meat denatures when it reaches a certain temperature. *Ito* then states that the central portion of the meat block retains the original red color or in the so-called half-roasted state. See *Ito*, column 1, lines 15-25. The half-roasted term refers to the state of the meat and not the exterior appearance of the meat block due to the denaturing of the blood pigment.

Ziegler discloses a blood pigment preparation for meat products. See *Ziegler*, column 1, lines 10-40. *Ziegler* fails to disclose an animal food piece including a coating having a roasted appearance after cooking or a need or use for the meat products to have a roasted appearance. Furthermore, *Ziegler* merely teaches incorporating whole blood in the meat itself to impart a desirable red color to the finished meat product, rather than using the blood as a colorant for coating the meat, which would lead the skilled artisan away from the present claims. *Id.*

Hagen discloses a composition of water-soluble food dye, edible fat and farinaceous material for coating good products prior to baking. See *Hagen*, column 3, lines 60-67. *Hagen* fails to teach or suggest a need or use for the goods to have a roasted appearance due to blood and proteins in the coating. *Hagen* further fails to disclose or suggest that its baked products are animal food compositions or are processed or suitable for animals thereby providing the skilled artisan no reason to use *Hagen* to arrive at the present claims.

Mizutani discloses a raw food material that is covered with a material containing grain flour using a batter as a binder and baked. See *Mizutani*, Abstract. Although *Mizutani* discloses

that the batter can include sodium alginate, *Mizutani* discloses that the raw material is coated with the batter and further covered with bread crumbs or wheat flour and baked. *Mizutani* fails to teach or suggest any coatings for the raw food material for generating a roasted appearance due to pigment/colorants and proteins in the coating. *Mizutani* further fails to disclose or suggest that its baked products are animal food compositions or are processed or suitable for animals thereby providing the skilled artisan no reason to use *Mizutani* to arrive at the present claims.

Igoe merely lists the definition of sodium alginate and its use as a binder, thickener or gelling agent. *Igoe* fails to teach or suggest that the sodium alginate can be used in coatings for generating a roasted appearance due to additional blood and proteins in the coating.

What the Examiner has done is to rely entirely on hindsight reconstruction of the claimed invention. Appellants respectfully submit that it is only through improper hindsight reconstruction of Appellants' claimed invention that the Examiner is able to piece together the teachings of the prior art so that the claimed invention is allegedly rendered obvious. Instead, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). One should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075. (Fed. Cir. 1988).

In sum, the skilled artisan would have no reason to arrive at the claimed invention using the cited references in the absence of hindsight. Accordingly, Appellants respectfully submit that Claims 10, 38 and 46, along with any of the claims that depend from Claims 10, 38 and 46, are novel, nonobvious and distinguishable from the cited references and are in condition for allowance.

D. THE REJECTION OF CLAIMS 22 AND 43 UNDER 35 U.S.C. §103(A) TO HOOD, CORBETT, FRANCIS, DURST, IGOE, STOLOFF, COPPAGE AND PALMER II SHOULD BE REVERSED BECAUSE THE EXAMINER HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF OBVIOUSNESS

Claims 22 and 43 depend from Claims 10 and 38, respectively, and therefore include the elements 10 and 38. In this regard, *Hood, Corbett, Francis, Durst, Igoe, Stoloff, Coppage* and *Palmer II* alone or in combination fail to disclose or suggest a coating having a roasted appearance after cooking on an animal food piece including from 55% to 85% by weight of at least one of a meat and a fish, from 10% to 25% by weight of a cereal, and from 6% to 15% by weight of water as required, in part, by independent Claims 10 and 38. Finally, *Hood, Corbett, Francis, Durst, Igoe, Stoloff, Coppage* and *Palmer II* alone or in combination fail to disclose or suggest an animal food piece or emulsion coating comprising the specifically recited mixture of sodium alginate in an amount from about 1% to about 2%, at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof, and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof as required by independent Claims 10 and 38.

Accordingly, Appellants respectfully submit that Claims 22 and 43 are novel, nonobvious and distinguishable from the cited references and are in condition for allowance.

E. THE REJECTION OF CLAIMS 10, 14, 16, 23-24, 38, 40-42 AND 44-46 UNDER 35 U.S.C. §103(A) IN VIEW OF HORROCKS, ITO, DUPONT AND ZIEGLER AND FURTHER IN VIEW OF HAGEN AND MIZUTANI SHOULD BE REVERSED BECAUSE THE EXAMINER HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF OBVIOUSNESS

1. *Horrocks, Ito, Dupont, Ziegler, Hagen* and *Mizutani* alone or in combination fail to disclose or suggest each and every element of independent Claims 10, 38 and 46

Horrocks, Ito, Dupont, Ziegler, Hagen and Mizutani alone or in combination fail to disclose or suggest a coating having a roasted appearance after cooking on an animal food piece including from 55% to 85% by weight of at least one of a meat and a fish, from 10% to 25% by weight of a cereal, and from 6% to 15% by weight of water as required, in part, by independent Claims 10 and 38. *Horrocks, Ito, Dupont, Ziegler, Hagen and Mizutani* alone or in combination fail to disclose or suggest a coating having a roasted appearance after cooking on a meat emulsion comprising a mixture of a meat, a cereal, a textured protein, water, vitamins, salt, a flavoring and a colorant as required by independent Claim 46. Finally, *Horrocks, Ito, Dupont, Ziegler, Hagen and Mizutani* alone or in combination fail to disclose or suggest an animal food piece or emulsion coating comprising the specifically recited mixture of sodium alginate in an amount from about 1% to about 2%, at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof, and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof as required by independent Claims 10, 38 and 46.

Horrocks discloses a meat-like protein food having the appearance and chewing properties of natural muscle meat. See *Horrocks*, column 1, lines 40-62. The meat-like protein food is made by impregnating bundles of artificial protein fibers with an emulsion containing a heat coagulable binding agent such as gluten, albumen or starch, forming at least at the surface of the impregnated bundles by coagulation, a protective layer resistant to cooking conditions, and compacting together a number of the bundles in an oriented arrangement, coagulating the binding agent and bonding the bundles together. *Horrocks* fails to teach or suggest any sodium alginate in the coatings for his meat-like protein food or a need or use for the meat-like protein food to have a roasted appearance.

Ito discloses a method of producing roast meat products by adding a red color pigment to and dispersing throughout a block of raw meat. See *Ito*, column 2, lines 17-32. The pigment has a discoloration temperature higher than the sterilization temperature of the meat product for a given heating time and the pigment losing its red color upon heating to the discoloration temperature or higher. *Ito* fails to teach or suggest any coatings for his meat products or a need or use for the meat products to have a coating.

Dupont discloses animal food compositions prepared from a mixture of from 55% to 85% meat and meat by-product and from 10% to 25% cereal ingredients by weight. See *Dupont*,

Abstract and column 2, lines 42-52. *Dupont* fails to teach or suggest any coatings for his animal food compositions or a need or use for the animal food composition to have a roasted appearance. Instead, *Dupont* discloses that the animal food compositions are stored with a sauce or a base in a container, which is distinguishable from a coating in accordance with the present claims

Ziegler discloses a blood pigment preparation for meat products. See *Ziegler*, column 1, lines 10-40. *Ziegler* fails to disclose an animal food piece including a coating having a roasted appearance after cooking or a need or use for the meat products to have a roasted appearance. Furthermore, *Ziegler* merely teaches incorporating whole blood in the meat itself to impart a desirable red color to the finished meat product, rather than using the blood as a colorant for coating the meat. *Id.* As such, *Ziegler* fails to disclose or suggest a coating having a roasted appearance after cooking wherein the coating comprises a specified range of powdered blood and/or a frozen blood in accordance with the present claims.

Hagen discloses a composition of water-soluble food dye, edible fat and farinaceous material for coating good products prior to baking. See *Hagen*, column 3, lines 60-67. *Hagen* fails to teach or suggest a need or use for the goods to have a roasted appearance due to blood and proteins in the coating.

Mizutani discloses a raw food material that is covered with a material containing grain flour using a batter as a binder and baked. See *Mizutani*, Abstract. Although *Mizutani* discloses that the batter can include sodium alginate, *Mizutani* discloses that the raw material is coated with the batter and further covered with bread crumbs or wheat flour and baked. *Mizutani* fails to teach or suggest any coatings for the raw food material for generating a roasted appearance due to pigment/colorants and proteins in the coating.

In sum, none of the cited references discloses using sodium alginate and a source of proteins along with powdered blood or frozen blood as a colorant at the claimed range that provides a roasted appearance coating on an animal food piece or animal meat emulsion in accordance with the present claims. For at least the reasons identified above, the cited references fails to disclose or suggest each and every element of independent Claims 10, 38 and 46. Accordingly, Appellants respectfully submit that Claims 10, 38 and 46, along with any claims that depend from Claims 10, 38 and 46, are novel, nonobvious and distinguishable from the cited references and are in condition for allowance.

2. The skilled artisan would have no reason to arrive at the claimed invention in view of the cited references

Appellants respectfully submit that the skilled artisan would not arrive at the claimed invention using the cited references in the absence of hindsight because the cited references are entirely directed to different food products utilizing varying ingredients for different intended purposes. Moreover, Appellants respectfully submit that the Examiner is using Appellants' patent application as a road map for creating hindsight obviousness and has failed to set forth sufficient reasons for how the skilled artisan would arrive at the claimed invention in view of the cited references. For instance, the cited references fail to disclose or suggest to the skilled artisan any single animal food coating formulation comprising sodium alginate, powdered/frozen blood and a protein in accordance with independent Claims 10, 38 and 46.

Horrocks discloses a processed meat-like protein food having the appearance and chewing properties of natural muscle meat. See *Horrocks*, column 1, lines 40-62. The meat-like protein food is made by impregnating bundles of artificial protein fibers with an emulsion containing a heat coagulable binding agent such as gluten, albumen or starch, forming at least at the surface of the impregnated bundles by coagulation, a protective layer resistant to cooking conditions, and compacting together a number of the bundles in an oriented arrangement, coagulating the binding agent and bonding the bundles together.

Dupont discloses processed animal food compositions prepared from a mixture of from 55% to 85% meat and meat by-product and from 10% to 25% cereal ingredients by weight. See *Dupont*, Abstract and column 2, lines 42-52. *Dupont* is directed to an animal food composition completely distinguishable from the processed meat-like protein food having artificial protein fibers of *Horrocks*. *Dupont* further fails to teach the need coatings for his animal food compositions or a need or use for the animal food composition to have a roasted appearance, which leads the skilled artisan away from the present claims. Instead, *Dupont* discloses that the animal food compositions are stored with a sauce or a base in a container, which is distinguishable from a coating in accordance with the present claims.

Ziegler discloses a blood pigment preparation for meat products. See *Ziegler*, column 1, lines 10-40. *Ziegler* fails to disclose an animal food piece including a coating having a roasted appearance after cooking or a need or use for the meat products to have a roasted appearance. Furthermore, *Ziegler* merely teaches incorporating whole blood in the meat itself to impart a desirable red color to the finished meat product, rather than using the blood as a colorant for coating the meat, which would lead the skilled artisan away from the present claims. *Id.*

Hagen discloses a composition of water-soluble food dye, edible fat and farinaceous material for coating good products prior to baking. See *Hagen*, column 3, lines 60-67. *Hagen* fails to teach or suggest a need or use for the goods to have a roasted appearance due to blood and proteins in the coating. *Hagen* further fails to disclose or suggest that its baked products are animal food compositions or are processed or suitable for animals thereby providing the skilled artisan no reason to use *Hagen* to arrive at the present claims.

Mizutani discloses a raw food material that is covered with a material containing grain flour using a batter as a binder and baked. See *Mizutani*, Abstract. Although *Mizutani* discloses that the batter can include sodium alginate, *Mizutani* discloses that the raw material is coated with the batter and further covered with bread crumbs or wheat flour and baked. *Mizutani* fails to teach or suggest any coatings for the raw food material for generating a roasted appearance due to pigment/colorants and proteins in the coating. *Mizutani* further fails to disclose or suggest that its baked products are animal food compositions or are processed or suitable for animals thereby providing the skilled artisan no reason to use *Mizutani* to arrive at the present claims.

Appellants respectfully submit that it is only through improper hindsight reconstruction of Appellants' claimed invention that the Examiner is able to piece together the teachings of the prior art so that the claimed invention is allegedly rendered obvious. Instead, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). One should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075. (Fed. Cir. 1988).

In sum, the skilled artisan would have no reason to arrive at the claimed invention using the cited references in the absence of hindsight. Accordingly, Appellants respectfully submit

that Claims 10, 38 and 46, along with any of the claims that depend from Claims 10, 38 and 46, are novel, nonobvious and distinguishable from the cited references and are in condition for allowance.

F. THE REJECTION OF CLAIMS 22 AND 43 UNDER 35 U.S.C. §103(A) IN VIEW OF PRASAD, HOOD, CORBETT, FRANCIS, DURST, IGOE, STOLOFF, COPPAGE AND PALMER II SHOULD BE REVERSED BECAUSE THE EXAMINER HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF OBVIOUSNESS

Claims 22 and 43 depend from Claims 10 and 38, respectively, and therefore include the elements 10 and 38. In this regard, *Prasad, Hood, Corbett, Francis, Durst, Igoe, Stoloff, Coppage* and *Palmer II* alone or in combination fail to disclose or suggest a coating having a roasted appearance after cooking on an animal food piece including from 55% to 85% by weight of at least one of a meat and a fish, from 10% to 25% by weight of a cereal, and from 6% to 15% by weight of water as required, in part, by independent Claims 10 and 38. Finally, *Prasad, Hood, Corbett, Francis, Durst, Igoe, Stoloff, Coppage* and *Palmer II* alone or in combination fail to disclose or suggest an animal food piece or emulsion coating comprising the specifically recited mixture of sodium alginate in an amount from about 1% to about 2%, at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof, and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof as required by independent Claims 10 and 38.

Accordingly, Appellants respectfully submit that Claims 22 and 43 are novel, nonobvious and distinguishable from the cited references and are in condition for allowance.

VIII. CONCLUSION

Appellants respectfully submit that the Examiner has failed to establish a *prima facie* case of obviousness under 35 U.S.C. §103 with respect to the rejections of Claims 10-11, 14, 16, 22-24 and 38-46. Accordingly, Appellants respectfully submit that the obviousness rejections are erroneous in law and in fact and should therefore be reversed by this Board.

A check in the amount of \$510 is submitted herewith to cover the cost of the Appeal Brief. The Director is authorized to charge any additional fees that may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3714652-491 on the account statement.

Respectfully submitted,

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Dated: August 25, 2010

CLAIMS APPENDIX
PENDING CLAIMS ON APPEAL OF
U.S. PATENT APPLICATION SERIAL NO. 10/501,975

10. An animal food composition comprising:

an animal food piece comprising:

from 55% to 85% by weight of at least one of a meat and a fish,

from 10% to 25% by weight of a cereal, and

from 6% to 15% by weight of water; and

a coating on the pet food piece and having a roasted appearance after cooking, wherein the coating comprises sodium alginate in an amount from about 1% to about 2%, from 5% to 10% by weight of at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof; and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof.

11. An animal food composition according to Claim 10 wherein the coating contains from about 30% to about 50% by weight of water.

14. An animal food composition according to Claim 10 wherein the source of proteins represents from about 5% to about 20% of the weight of the coating.

16. An animal food composition according to Claim 10 wherein the coating further comprises a component selected from the group consisting of a thickener in addition to the sodium alginate, a binder, an additive, flour, water and combinations thereof.

22. An animal food composition according to Claim 10 wherein the coating comprises a mixture of: a caramelized sugar, a starch, a guar, a carboxymethyl-cellulose, a flour, water, a plasma, a powdered blood, sodium alginate, a salt, a sugar, an ascorbic acid, a gluten and an iron oxide.

23. An animal food composition according to Claim 10 wherein the coating after cooking creates a non-homogenous, irregular, random roasted appearance to the food composition.

24. An animal food composition according to Claim 10 wherein the composition is cooked by a system selected from the group consisting of a hot air system, a steam system, a combined hot air and steam system, a microwave system.

38. An animal food composition comprising:

an animal food piece comprising:

from 58% to 68% by weight of at least one of a meat and a fish,

from 10% to 25% by weight a cereal,

from 2% to 5% of a plant protein, and

from 5% to 14% by weight of water; and

a coating on the pet food piece and having a roasted appearance after cooking, wherein the coating comprises sodium alginate in an amount from about 1% to about 2%, at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof; and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof.

39. An animal food composition according to Claim 38 wherein the coating contains from about 30% to about 50% by weight of water.

40. An animal food composition according to Claim 38 wherein the source of pigments or colorants represents from about 5% to about 20% of the weight of the coating.

41. An animal food composition according to Claim 38 wherein the source of proteins represents from about 5% to about 20% of the weight of the coating.

42. An animal food composition according to Claim 38 wherein the coating further comprises a component selected from the group consisting of a thickener in addition to the sodium alginate, a binder, an additive, flour, water and combinations thereof.

43. An animal food composition according to Claim 38 wherein the coating comprises a mixture of: a caramelized sugar, a starch, a guar, a carboxymethyl-cellulose, a flour, water, a plasma, a powdered blood, sodium alginate, a salt, a sugar, an ascorbic acid, a gluten and an iron oxide.

44. An animal food composition according to Claim 38 wherein the coating after cooking creates a non-homogenous, irregular, random roasted appearance to the food composition.

45. An animal food composition according to Claim 38 wherein the composition is cooked by a system selected from the group consisting of a hot air system, a steam system, a combined hot air and steam system, a microwave system.

46. An animal food composition comprising:
a meat emulsion comprising a mixture of a meat, a cereal, a textured protein, water, vitamins, salt, a flavoring and a colorant; and
a coating on the meat emulsion and having a roasted appearance after cooking, wherein the coating comprises sodium alginate in an amount from about 1% to about 2%, at least one of a source of pigments or colorants selected from the group consisting of a powdered blood, a frozen blood and combinations thereof; and a source of proteins selected from the group consisting of a plasma, a gluten, a blood, and combinations thereof.

EVIDENCE APPENDIX

None

RELATED PROCEEDINGS APPENDIX

None